

FEDERAL CIRCUIT COURT OF AUSTRALIA

*PACHABHAIYA v MINISTER FOR
IMMIGRATION & ANOR*

[2015] FCCA 1040

Catchwords:

MIGRATION – Migration Review Tribunal – Partner (Temporary (Class UK))
visa – no jurisdictional error.

PRACTICE AND PROCEDURE – Summary dismissal – proceedings
summarily dismissed.

Legislation:

Federal Circuit Court Act 1999, s.17A

Federal Circuit Court Rules 2001, r.13.10

Migration Act 1958, s.476

Migration Regulations 1994, Schedule 2 cl.820.211(2)

Cases cited:

Spencer v the Commonwealth of Australia (2010) 241 CLR 118

Applicant:

PURAN PACHABHAIYA

First Respondent:

MINISTER FOR IMMIGRATION &
BORDER PROTECTION

Second Respondent:

MIGRATION REVIEW TRIBUNAL

File Number:

SYG 815 of 2015

Judgment of:

Judge Street

Hearing date:

23 April 2015

Date of Last Submission:

23 April 2015

Delivered at:

Sydney

Delivered on:

23 April 2015

REPRESENTATION

The Applicant appeared in person

Solicitors for the Respondent: Ms N. Senanayake
DLA Piper

ORDERS

- (1) The Proceedings be summarily dismissed.
- (2) The Applicant to pay the First Respondent's costs fixed in the sum of \$580.
 - (i)

**FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT SYDNEY**

SYG 815 of 2015

PURAN PACHABHAIYA
Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION
First Respondent

MIGRATION REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

1. This is an application for a Constitutional writ within the Court's jurisdiction under s.476 of the *Migration Act 1958* in respect of a decision of the Tribunal made on 3 March 2015 affirming a decision of the delegate not to grant the applicant a Partner (Temporary (Class UK) visa. The application identifies on the first Court:

The Court may hear and determine all interlocutory or final issues, or may give directions for the future conduct of the proceeding.

2. The application set out the following grounds:

1. I ask the Court to accept my review as I am entitled to have the visa because my partner and I lived together and I was committed to her. The Tribunal said on my behalf that there were no

compelling reasons at the time that I lodged my application. The Tribunal misunderstood what I said as I did not say that and I look forward to receive the CD hearing to put transcript to the Court.

3. The first respondent moved for summary judgment on the ground that the application had failed to disclose any arguable jurisdictional error. I take into consideration in respect to the Court's summary disposal powers under s.17A (*Federal Circuit Court Act 1999*) and r.13.01 (*Federal Circuit Court Rules 2001*) the principles and caution identified in *Spencer v the Commonwealth of Australia* (2010) 241 CLR 118, at [24]-[25] and [59]-[60]. I accept the first respondent's submissions that the Tribunal found the applicant did not satisfy the Schedule 3 criteria that there were not compelling reasons for applying that criteria and that the Tribunal accordingly found the applicant had not satisfied cl.820.211(2) of Schedule 2 of the *Migration Regulations 1994*.
4. The applicant asserts that the Tribunal misunderstood what he said, but has not identified any aspect or particular in respect of that assertion. The applicant has asserted that he requires an opportunity to obtain the CD and to put the transcript before the Court. There is no utility in granting an adjournment if the proceedings are clearly doomed to failure as it will only unnecessarily increase the costs of the parties and utilise limited Court time.
5. For the reasons given I am clearly satisfied the proceedings are doomed to failure. It is relevant in this regard, as the first respondent identified, that the Tribunal at para.28 records the applicant said there were no compelling reasons except that he and his sponsor were in love and the Tribunal relevantly found in paras.28 - 29 that was not a compelling reason.
6. The application clearly fails to disclose any arguable jurisdictional error. The applicant applied for the visa on 12 June 2012 which was refused on 9 September 2012. The applicant lodged an application for a review on 25 September 2013 and appeared before the Tribunal at a hearing on 3 March 2015 to give evidence and present arguments and was assisted by an interpreter. The Tribunal identified what occurred before the delegate and relevantly the delegate's adverse finding as not

being satisfied that the applicant was residing with his sponsor in a de facto relationship at the time of the application or for the 12 months prior to lodging the application.

7. The applicant informed the Tribunal that the relationship ended eight to nine months ago due to arguments about money. The Tribunal identified the critical issue:

The issue in the present case is whether the applicant was in a genuine de facto relationship his sponsor at the time of application and continues to be in a genuine de facto relationship and, if so, whether there are compelling reasons to not apply the Schedule 3 criteria that he be the holder of a substantive visa at the time of application.

8. The Tribunal noted in relation to the requirement of a de facto relationship at the time the visa application was made and at the time of the decision relevantly:

18. The applicant told the Tribunal that he was no longer in a de facto relationship with his sponsor, and had not been in a relationship for the last eight or nine months. The relationship ended due to arguments about money.

19. Based on the above evidence, the Tribunal finds that the parties do not have a mutual commitment to a shared life to the exclusion of others, they live separately and apart on a permanent basis and they do not have a genuine and continuing relationship. The Tribunal therefore finds that the applicant does not meet the requirements of s.5CB(2)(a)-(c) at the time of decision.

9. It was in those circumstances that the Tribunal found the applicant did not meet cl.820.221 and the Tribunal turning to the Schedule 3 criteria then found that the applicant did not satisfy the criteria under 3001 and turned to the issue of compelling reasons and made adverse findings which were clearly open on the material before the Tribunal.

10. I am satisfied that the proceedings are doomed to failure. I am satisfied the applicant had a genuine hearing. I am satisfied that the findings made by the Tribunal were open and can not be said to lack an evident and intelligible justification. I am satisfied that there is no substance in relation to the claim of the Tribunal having misunderstood the applicant and that there is no utility in the granting of any adjournment. I am clearly satisfied the proceedings have no reasonable prospect of success. The proceedings are summarily dismissed.

I certify that the preceding ten (10) paragraphs are a true copy of the reasons for judgment of Judge Street

Associate:

Date: 29 April 2015